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Awareness of Racial Discrimination in American Policing:
Transforming The Silent Observer

Black lives matter is a chant that, prior to the murder of Michael Brown and the ruled homicide of Eric Garner, was not spoken though certainly thought about. That America is a racist society is not often disputed. And while the government may not control the racial thoughts of its citizens, it has full control over laws and their enforcement. However, history shows that racial discrimination is embedded in local and national policing. From the 14th Amendment's failed promise to the discrimination embedded in national policing of enemy aliens, the citizens of this country have remained largely silent observers to the blatant racial discrimination in America.

The results of counteracting racial discrimination in local policing through the courts have destroyed the 14th Amendment's promise of equality. A study indicating that the "death penalty in Georgia was imposed more often on black defendants and killers of white victims than on white defendants and killers of black victims failed to establish ... [a] violation of equal protection clause" in *McKleskey v. Kemp*. For the petitioner, proving that similarly situated defendants did *not* receive the death penalty was not enough. The petitioner needed proof that the decision makers in *his particular case* acted with discriminatory purposes. *United States v. Armstrong* further dictates that discriminatory effect is insufficient for an equal protection violation – a discriminatory intent must be proven. *Armstrong* involves all black defendants claiming that the U.S. attorney selectively

prosecutes black offenders in federal court for crack offenses. The court ruled that a defendant does not have the right to access a prosecutor's file – which would show that the office prosecuted only black crack cases – unless he first introduces evidence showing others in a similar circumstance were not prosecuted due to racial discrimination. This results in a classic Catch-22 problem. It should therefore come to no surprise that “successful claims of discriminatory prosecution are unheard of” (Stuntz 120).

The results of both *McKleskey* and *Armstrong* are shamefully predictable following the historical precedence of *United States v. Reese* and *United States v. Cruikshank*. In a chapter titled “The Fourteenth Amendment’s Failed Promise,” William Stuntz presents both cases as evidence for the death of the ideal of equal protection – “the notion that all Americans are entitled not only to freedom from government oppression, but to a measure of freedom from private violence as well” (117). In *US v Reese*, the Court set aside convictions of Kentucky election officials for conspiracy to deprive a black prospective voter of his right to vote. They had refused to register him when he offered to pay his poll tax, and the Supreme Court overturned the conviction of violating the Enforcement Act by conspiring to deprive the victim of his right to vote. The Justices declared, “the Act did not require proof that the defendants’ conduct was racially motivated” (Stuntz, 114). After that decision, “even Klan-influenced government officials were nearly unconvictable, thanks to the requirement that the omnipresent but unprovable discriminatory motive be established in every case” (Stuntz 117). In *United States v Cruikshank*, the Court did not convict the Colfax massacre’s leader who made a sport of lining up black men at the parish to see how many he could execute with a single bullet. They concluded that the Fourteenth Amendment’s equal protection principle only prohibited state action and did not “add

anything to the rights at which one citizen has under the Constitution against another.” Both *Reese* and *Cruikshank* stripped the power of the government to protect its citizens from inequality so effectively that the results of *McKleskey* and *Armstrong* flow quite naturally.

Stuntz correctly used history and the role of Supreme Court cases for explaining the current criminal justice system. As Stuntz indicates, the worst forms of discrimination usually do take place in a private wrongdoing which government officials are able to ignore in the eyes of the law. According to the wording of the 14th Amendment, a private citizen is not forbidden by the United States government from acting discriminatorily. And along with the rulings from *McKleskey* and *Armstrong*, government officials are free to intentionally or otherwise produce a discriminatory effect that – without a note left behind to provide evidence of intent to discriminate – is safeguarded by the highest courts in American. Stuntz is correct to state that these judges “ – especially federal ones, and especially the nine who sit on the nation’s highest court – have been obstacles” (308). And through the use of history, he accurately supports that the pattern traces as far back as the *Cruikshank* Court. It extended past the Civil Rights Movement as seen through *Armstrong* and *McKleskey*. And its effects are still felt, as today’s turmoil demonstrates the continued fight for equality in America.

Racial discriminatory affects are exasperated by life after incarceration and its creation of a second-class citizen. “Our criminal justice system makes permanent outcasts of convicted criminals and stigmatizes other low income blacks as threats to public safety” (Forman 104). While the mantra is “Do the Crime, Do the Time,” the time (through mandatory minimum sentencing) has become “endless” and people with criminal records

are locked out of civil society permanently (Forman 107). The rights lost to a person convicted of a crime today, though it varies depending on the state and offense, includes the right to vote or serve on a jury, and ineligibility for health and welfare benefits, food stamps, public housing, student loans, and certain types of employments (Forman 107). Forman rightfully concludes the negative cycle and traps for offenders who, for the most part, already come from backgrounds of tremendous disadvantage and are then heaped with additional disabilities (109).

The emergence of a felon as a second-class citizen has been largely compared to the Jim Crow era. James Forman approves of the majority of Michelle Alexandra's Jim Crow analogy such as its effectiveness to draw the attention "to the plight of black men whose opportunities in life have been permanently diminished by the loss of citizenship rights and the stigma they suffer as convicted offenders" (Forman 102). Mass incarceration encourages society to see the black population – particularly young black men in low-income communities – as potential threats. Even the young, low-income black men who are never arrested or imprisoned bear the stigma associated with race (Forman 111). However, white conservatives were not alone in demanding more punitive crime policy. Unlike in the Jim Crow era, "blacks [today] are much more than subjects; they are actors in determining the policies that sustain mass incarceration in ways simply unimaginable to past generations" (Forman 116). The new Jim Crow writers encourage mass incarceration to be overwhelmingly a result of the War on Drugs and race. However, one third of our nation's prisoners are white (Forman 136), drug offenders constitute only a quarter of our nation's prisoners (104), and the role of violent offenders, which make up one half of the population, are minimized. "The Jim Crow analogy pushes non-black prisoners to the

margin” and limits the conversation to decrease mass incarceration and improve treatment of all felons (Forman 142).

While Alexander’s analogy to the Jim Crow era is persuasive, Forman’s breakdown of her analogy resonates more powerfully. For example, she begins the book with the story of Jarvis Cotton and his father, grandfather, great-grandfather, and great-great-grandfather. Like them, he has been denied the right to vote. Nonetheless, her intriguing connection with disenfranchisement of felons (such as Jarvis Cotton) and of black men in American history loses its effect when one realizes Cotton committed murder. Slavery and the Jim Crow laws disenfranchised and degraded *all* African Americans. Jarvis Cotton would be able to vote today had he not kill someone. Perhaps the greater question is whether, having completed his prison sentencing, Cotton should be allowed to vote and enjoy the benefits that all “first-class” citizens obtain (welfare, housing, etc). The Jim Crow analogy does not promote that type of question. Answering the question and beginning a dialogue that presents felons as human beings rather than unrelatable criminals is the unspoken or perhaps unrecognized first step. Society should strive to, as quickly as possible, have men and women who served prison time become law-abiding citizens. The current consequences facing felons long after completion of their prison time creates a negative cycle – particularly for those of low income – that promotes a return to prison as Forman states. While racial discriminatory effects are exasperated by the creation of a second-class citizen, the creation of a second-class citizen is larger than race and must be tackled as such in order to bring equality for all Americans. It requires an examination of what the criminal justice system actually seeks to provide and whether its current forms of punishment truly work to protect all of its citizens.

A large part of America's citizens are immigrants. Immigration has steadily blended into criminalization in the eyes of the law – another consequence of racism. David Alan Sklansky stated that “immigration crimes now account for a majority of all federal prosecutions; deportation is widely seen as a key tool of crime control; immigration authorities run the nation's largest prison system; and state and local law enforcement officers work hand-in-hand with federal immigration officials” (157). There has always been some overlap between immigration enforcement and criminal justice. The poor, desperate, and racially disfavored, as Sklansky states, are more likely to seek admission to the United States and more likely to encounter resistance and thus come into contact with the criminal justice system as victims, suspects, defendants, and convicted felons (158). The change towards criminalization of immigration law accelerated after September 11, 2001 (Sklansky 163). Following the attacks, “the Department of Justice and later the Department of Homeland Security launched a series of programs aimed at enlisting local law enforcement agencies as partners in the enforcement of immigration laws and, conversely, allowing the police to use immigration law as a tool of crime control” (Sklansky 187). The rise of crimmigration is closely linked to the escalating concerns about immigration and fear of “criminal aliens” which rose following September 11 (Sklansky 193). The rise in crimmigration is exasperated if not created by nativism, overcriminalization, and a cultural obsession with security which leaves minority citizens, illegal immigrants, and immigrants hoping to call America home vulnerable and under attack.

The criminalization of immigration law can be traced back through American's history. In 1929, Congress made illegal entry into the United States a misdemeanor and

illegal entry following deportation a felony (Sklansky 164). Beginning in 1980s, Congress passed a series of statutes to expand basis for deportation and took away the power of judges to block deportation through sentencing. In 1988, the Anti-Drug Abuse Act, raised the criminal penalties for unlawful reentry following deportation if the deportation resulted from a felony conviction, and for aiding the illegal entry of aliens previously convicted of "aggravated felonies" or known to be entering the country illegally" (Sklansky 165). Sentences continued to rise through the Immigration Act of 1990, the Violent Crime Control and Law Enforcement Act of 1994, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. While the ICE claims that programs that target illegal immigrations focuses on "dangerous criminals", the 79 percent of aliens deported through June 2010 had no criminal convictions or had been arrested for relatively low-level offenses. Once again, there is a disparity between the tough sentencing laws, the racial effect of the laws, and the supposedly intent of the law.

The use of history and detailed chronology of the various immigration laws by Sklansky form a backbone from which to begin to dissect the criminalization of immigration law. Nonetheless, Sklansky failed to draw the powerful connection with the evolution of the law and local policing in America. The radically increasing sentencing mirrors the mandatory sentencing in American law, which has contributed not only to mass incarceration but also unbalanced punishment for minorities. Nativism, as seen in immigration, mirrors racism in society and both are deeply rooted in American history. Sklansky's history of immigration law and acknowledgement of nativism as a component for its criminalization grazes the uncomfortable topic of race instead of hitting it straight

on, the way Alexander or Forman would. The root of criminalization of immigration law must be uprooted through a direct attack on the nativism fueling its legislature.

Discrimination has also become embedded in the national policing of enemy aliens. One example is the Holy Land Foundation, an Islamic charity located in Texas, which funneled money to zakats to aid the orphans and widows of Palestine. However, a federal grand jury charged the Holy Land Foundation and five former employees with aiding Hamas – a terrorist organization – because Hamas allegedly controlled the zakat committees. In *United States v. Mohammad El-Mezain*, the Supreme Court found that the trial court erred in admitting certain items of evidence – the Simon testimony, the McBrien testimony, the Shorbagi testimony, and the documents recovered from the Palestinian Authority headquarter – but felt the error of admitting such evidence did not affect the outcome of the trial. Although the first trial resulted in a partial acquittal for one defendant and a hung jury on all charges, the retrial in 2008, which introduced these erroneously admitted evidence, resulted in little jury deliberation for finding the remaining defendants guilty on all counts. The defendants’ petition for rehearing was denied without comment.

With closer examination at the Japanese Internment during World War II, the current treatment of Arab Americans is as predictable as the outcomes in *McKleskey* and *Armstrong* following *Cruikshank* and *Reese*. Natsu Saito makes the bold and rarely stated notion that interment of Japanese Americans was not an aberration but rather a logical extension of the treatment of Asians in America (3). The logical conclusion extends from the 1790 Naturalization Act’s “limitation of citizenship to ‘free white persons,’ to lynching and Jim Crow laws, to Chinese exclusion in the 1880s and the exclusion of the Japanese in the early 1900s, to the alien land laws, and to the National Origins act of 1924” (Saito, 8).

Hollywood movies reflect and perpetuate the racial stereotypes in America (Saito 13). And now, the media particularly identifies Arabs and Muslims with terrorists. The government subverts civil rights and undermines safeguards of judicial review because it taps into race-based fears and uses the “national security” card to gloss over the details (Saito 26). Susan Akram says, “The use of secret evidence in deportation proceedings is the most powerful tool in an apparently systematic attack by the U.S. governmental agencies on the speech, association and religious activities of a very defined group of people: Muslims, Arabs, and U.S. lawful permanent residents of Arab origin residing in this country” (Saito 26). Saito comments that the current discrimination of Arab and Muslims in America questions whether there was truly any real meaning behind the redress for the Japanese American internment.

Saito’s comparison of the discrimination Asian Americans faced prior to Japanese internment and that of Muslim and Arab Americans, which she wrote before the September 11th attacks, truly help to define the current state of America’s discriminatory national policing. First, having written her paper prior to the September 11th attacks and reading it as someone who grew up in a post 9/11 world, her comparison of Arab discrimination to Asian discrimination is strengthened. Prior to her paper, one may similarly assume that Japanese internment was an aberration or that it was the attack on the twin towers that lead to the Arab and Muslim mistrust and discrimination. Yet, the discrimination, which in itself is not presented merely through Hollywood movies and the media, but made concrete through law, prior to WWII and prior to 9/11, is heinous and overlooked. Saito correctly identifies the power of the “national security” card to justify rulings, interpretations of laws, and creation of laws that prosecute a defined ethnic minority. Like discrimination in

local policing, the discrimination in national policing leaves those most affected by the law voiceless – without a right to vote for a convicted felon and without due process rights as a suspected enemy alien (Kiareldeen rule in Saito 22).

The historical analogies in both local and national policing serve to describe the roots of the current problems faced by felons, immigrants, and “national threats”. To demonstrate the overlap between local and national policing, I am going to turn to the Cortes case regarding Arizona’s SB 1070 landmark immigration enforcement law. The law, one of the strictest anti-immigration legislatures, can be compared to the effect of implementing minimum sentencing in local policing and criminalizing immigration law in national policing. The U.S. Supreme Court upheld the law’s requirement to have police determine the immigration status of someone arrested or detained when there is “reasonable suspicion” that they are not in the U.S. legally. Such language inevitably invites an unchecked police discretion and places immigrants – whether illegal or not – exposed to discriminatory and racial behavior by an officer. In local policing, all young black men are affected and biased in low-income communities whether they have committed a crime or not. Similarly, immigrants, whether illegal or not, will be biased and subjected to further police questioning based on accents and physical appearances. Ms. Cortes is filing a Fourth Amendment violation due to her prolonged stop on the basis of her immigration status. An equal protection violation is unsurprisingly missing.

The clear discriminatory and racial affect of Arizona’s SB 1070 should not be understated despite the absent claim for an equal protection clause violation. America’s history of racial targeted laws – from the Chinese exclusion in the 1880s, alien land laws, National Origin Acts of 1925, and Japanese internment during World War II – should

educate us. During the Japanese internment, Saito described hearing “stories of the white neighbor families who stood by, many sympathetic, even sad, watching silently as our families were herded onto trucks by soldiers with bayonets” (28). Our lesson is simple: “We must not become those silent observers” (28).

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